

October 15, 2015

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: WC Docket No. 12-375 – ICSolutions’ Notice of Permitted *Ex Parte* Meetings and Comments on the FCC Fact Sheet, issued September 30, 2015

Dear Secretary Dortch,

On October 14 and 15, 2015, ICSolutions, represented by Tim McAteer, ICSolutions’ President, and Charlena Aumiller, Esq., CPA, Documentations Department, met with the following persons: Stephanie Weiner, Legal Advisor to Chairman Wheeler; Rebekah Goodheart, Legal Advisor to Commissioner Clyburn; Madeleine V. Findley, Deputy Bureau Chief; Gil Strobel, FCC Staff (via conference call); Travis Litman, Legal Advisor to Commissioner Rosenworcel; Nicholas Degani, Legal Advisor to Commissioner Pai; Amy Bender, Legal Advisor to Commissioner O’ Rielly; and Travis Litman, Legal Advisor to Commissioner Rosenworcel. The purpose of this meeting was to discuss the Commission’s intended proposed rules, as provided in the FCC’s Fact Sheet released on September 30, 2015 (“Fact Sheet”). We have summarized the points we discussed in this letter. In addition, we discussed some of the details in our commentary provided in Attachment 1.

In advance of the Commission’s final order, we wanted to address a few potential issues that, if exploited by inmate calling services (“ICS”) providers, would undermine the Commission’s overall goal of “ensuring just, reasonable, and fair rates” for consumers.

These potential areas include:

1. The allowance of ICS vendors to pass through unlimited, uncapped, or otherwise unrestricted third-party financial transaction fees.
2. The absence of notice requirements to consumers for applicable fees and payment options.
3. The absence of restrictions on the establishment of per-transaction minimum and maximum funding amounts.

1. Capping or Restricting Pass-Through Third-Party Financial Transaction Fees

The first issue to address is the allowance of “[t]hird-party financial transaction fees, such as fees charged by MoneyGram or Western Union, may be passed through with no mark-up.”

We recommend the FCC limit third-party financial transaction fees to the same caps or other restrictions outlined in the Fact Sheet.

Leaving such third-party financial transaction fees unfettered by caps or other restrictions creates the potential for vendors to enter into fee-sharing arrangements with these third parties, thereby complying with the pass-through cost component, but still unnecessarily increasing consumers’ cost.

Both Western Union and MoneyGram currently have payment options with fees at or below the recommended live agent fee of \$5.95. There are many other providers that offer the same fee structure.

Any allowable third-party financial transaction fees should be limited to the same caps as those charged directly by ICS providers. This cap would have the natural consequence of reining any secondary “fee sharing” arrangements between the parties that can unnecessarily increase the cost of financial transactions to consumers.

2. Requiring Notice Standards for Fees and Payment Options

The Fact Sheet does not address notice standards, and we believe rules for notice of calling options and funding methods are necessary to protect consumers. Initial calls from inmates are typically unexpected by their loved ones and, oftentimes put called parties instantly in a stressful and emotional state of mind. Clear upfront notice of all available calling options and payment methods is imperative to reduce total costs for consumers.

We submit that the FCC should impose notice standards to protect consumers, requiring transparent choices unfettered by marketing strategies which may be designed to steer consumers toward higher-cost options.

Such standards should make it easy for consumers to understand their options, both in terms of the cost of the call and in having notice of when funds will be available to make calls. The standards should require basic, straightforward notice of all fees and payment options, along with a mandatory order of the initial announcement for standard calls and funding types before the offering of any optional funding types. Additionally, all information should be available visibly, such as on a website.

These requirements should not prohibit vendors from marketing certain payment options over others, but such marketing should occur separately from the communication of all fees and payment methods, and after the communication of the costs for standard call types and any in-

house funding methods. Regardless of the payment option, communications should be basic and clear.

3. Regulating Minimum and Maximum Funding Amounts

Another loophole is that the FCC Fact Sheet does not address limitations on the funding amounts for each transaction. ICS providers can simply lower the maximum funding amount they will process per transaction, thereby requiring consumers to fund their account more frequently so that they can charge more ancillary payment fees. We recommend the FCC's rules require that consumers have the option to deposit at least \$25.00 onto a prepaid calling account.

Finally, some providers require consumers to deposit at least \$25.00 to fund a prepaid calling account. Allowing a high minimum funding requirement can preclude consumers from receiving calls from their loved ones. We recommend the FCC's rules prohibit any minimum funding amounts.

Conclusion

If the FCC fails to address these issues, we believe the current efforts to reform inmate calling services will again fall short of achieving the goal to reduce total costs to consumers of such services.

Further comment is provided in Attachment 1.

Thank you,



Tim McAteer
President, ICSolutions

Copy via email to:

Chairman Tom Wheeler

Commissioner Mignon Clyburn

Commissioner Jessica Rosenworcel

Commissioner Ajit Pai

Commissioner Michael O'Rielly

Stephanie Winer, Legal Advisor to Chairman Wheeler

Rebekah Goodheart, Legal Advisor to Commissioner Clyburn

Travis Litman, Legal Advisor to Commissioner Rosenworcel

Nicholas Degani, Legal Advisor to Commissioner Pai

Amy Bender, Legal Advisor to Commissioner O' Rielly

Madeleine V. Findley, Deputy Bureau Chief

Gil Strobel, FCC Staff

ATTACHMENT 1

Further Comment on the FCC's Fact Sheet, Facts in the Record, and Applicable Law

As provided in the FCC's Fact Sheet, released September 30, 2015, the FCC has considered all reasonable and necessary costs provided by Inmate Calling Services ("ICS") providers and determined the just and reasonable rates accordingly, leaving the decisions of how to utilize the company's profits to the ICS provider. This approach supports competition, allowing ICS providers to vary their offers based on the needs of the facility. We understand that the applicable law requiring just and reasonable rates is not dictated by ICS providers seeking to recover costs that are unnecessary to the provision of safe, secure inmate calling services (such as GPS tracking/monitoring devices, video monitoring systems, video visitation systems, managed access systems, cellphone detection products, cellphone data extraction products, offender management systems, facility informational IVR systems, voice biometrics, inmate kiosks or tablets, and similar products). Thus, just and reasonable rates can lawfully be lower than the ICS provider's actual — but unnecessary — costs without being confiscatory.

The FCC's Fact Sheet has proposed rules that refrain from infringing on the ICS providers' legal rights to spend profits as the investors deem appropriate. This approach balances the consumers' interests for lower costs of calling services with the ICS providers' interests to recover reasonable, prudent, and necessary costs.

Some ICS providers may recommend the FCC increase the rate caps to include a commission component and prohibit any type of profit sharing otherwise. We disagree with this approach because it will directly decrease competition, in contradiction with Congress' express purpose that the FCC seek to increase competition in telecommunications, as provided in the Telecommunications Act of 1996. Indeed, any suggestions for fixing the amounts ICS providers can offer facilities removes what is currently a variable option for facilities because facilities would no longer be able to choose the cost efficient ICS provider. It would be against public policy to restrict commissions while permitting providers to use net revenues in the form of technology grants or other services that are unnecessary and / or unrelated to inmate calling because such an approach encourages gold-plating, while deterring companies from striving for cost efficiency to increase their competitiveness.

Moreover, the FCC's jurisdiction over setting the rates cannot be confused with the authority to dictate how investors in ICS companies utilize their profits. If the FCC deems a higher rate cap is appropriate, we welcome that change. Our issue is with any regulation over how an investor can spend the company's profits or net revenue once a rate cap is set. As discussed in our initial comment filed in this Docket on January 12, 2015, the FCC does not have the authority to dictate how investors in ICS companies invest or spend their profits. Thus, not only would this approach exceed the FCC's jurisdiction, it would be inappropriate to cap the commissions with an additive rate component that is essentially pass-through costs without also capping the amount of unnecessary and / or unrelated technology that can be offered as an incentive for to select the ICS provider for the ICS contract.

In addition, some providers may try to support that an express cap on commissions or other regulation or prohibition is necessary in order for the ICS providers to renegotiate their current contracts. Any such argument is disingenuous if it comes from a company that renegotiated its contracts to eliminate commissions on interstate calling revenue under the FCC's Order capping interstate rates even though there was no such express prohibition in that Order.¹ In Appendix E, we have provided four contracts that were obtained as public records. Two of these contracts were executed since the FCC's initial rate order and notice for further rulemaking.² The other two contracts were executed prior to the initial rulemaking period.³ All of the contracts include clauses allowing the ICS provider to renegotiate the contract if regulations change and / or rates are regulated. It is important to note that while the ICS provider's option to renegotiate the contract is triggered by the regulatory change, there are no limitations in the renegotiations, thereby allowing the ICS provider to renegotiate other terms that may have been indirectly affected by the regulatory change. Thus, any argument that they are incapable of renegotiating their contracts is unsupported by the example contracts, and it appears that these ICS providers would have the same ability to negotiate necessary changes to their current contracts, which could include reductions in in-state calling commissions, just as they did previously. While the ICS providers may have contracts that expressly prohibit them from renegotiating commissions, such a provision would have been part of the initial bargain and, as a regulated entity, the ICS provider either knew or should have known that they would have to bear the regulatory risk of changes to the rates and the impact on commissions when considering whether to enter into the

¹ *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, No. FCC 13-113, 28 FCC Rcd. 14107 (released Sept. 26, 2013).

² Appendix E. Please refer to the GTL contract with Tom Green County, TX, dated June 23, 2015, Page 6, Paragraph 22 ("Neither party to this Agreement shall be responsible or liable to the other for. . . the inability to act or perform their obligations under this contract due to circumstances, events or acts of others beyond their reasonable control, including, but not limited to, . . . changes in regulatory rules or regulations affecting the ability of either party to reasonably carry out its obligations under this Agreement."), and the Securus contract with San Bernardino County, CA, dated June 2, 2015, Page 8, Paragraph D.15 ("Force Majeure. Contractor shall not be liable for failure to perform or for any damages under this Contract if such failure to perform arises out of causes beyond the control and without the fault or negligence of Contract. Such causes may include, but are not limited to, . . . acts of the State or Federal government in their sovereign or contractual capacities. . . .) and Page 14, Paragraph E.1.1 ("Contract Modifications Resulting from Federal or State government Actions. Actions taken by the Federal or State government regarding inmate telephone services operating rules, pricing or other telecommunications-related matters such as but not limited to the elimination of commission based contracts, changes to the allowable rates for calling, may require this contract to be modified."). See also Page 2, Paragraph 5 of GTL's standard template for agreements, provided in its bid for Orange County, California in 2014.

³ Appendix E. Please refer to the Securus contract with Irving County, Texas, Page 3, Paragraph 14 ("Uncontrollable Circumstance. The parties reserve the right to renegotiate or terminate this Agreement . . . if circumstances outside our control related to the Facilities (including, without limitation, changes in rates, regulations Further, Customer acknowledges that Provider's provision of the services is subject to certain federal, state or local regulatory requirements and restrictions which are subject to change from time-to-time and nothing contained herein to the contrary shall restrict Provider from taking contained herein to the contrary shall restrict Provider from taking any steps necessary to perform in compliance therewith.") and GTL contract with City of St. Louis, Missouri, Page 2, Paragraph 5 (Rates. The telephone rate structure and surcharge rates shall not exceed the maximum rates as authorized by the state's telecommunication regulatory authority and the Federal Communications Commission (FCC). Any rate changes mandated by the state/local regulatory authority and/or the FCC which adversely affect this Agreement shall entitle the Company to, at its option, renegotiate or cancel this Agreement") (while the City of St. Louis has since changed providers, there is nothing to suggest this contract is unique from GTL's then standard contract terms and conditions used in other contracts prior to December 24, 2012).

agreement, especially if those agreements were entered into after the FCC first began this rulemaking proceeding on December 24, 2012 in WC Docket 12-375.

In addition to the gaps and loopholes discussed further below, we believe the basis of the FCC's rate caps for the prison rates is arbitrary and capricious because prison rates are treated differently than the rates for jails tiered by population. While inmate population is just one variable that affects the cost to serve a facility,⁴ the discrepancy in the prison rates and the jail rates ignores the fact that there are prisons with less population than large county or municipal jails. We think a more reasonable rate cap would be to have the prison rate caps mirror the jail rate caps.

ICSolutions can comply with the proposed rules in the Fact Sheet. Some ICS providers may make the general argument that they will be forced to stop operating. They may even hint at warnings that a large amount of consumers will be left without service if they should be forced to stop operating.⁵ The threats of a few in the industry should be taken in the context that the ICS industry is a competitive market with multiple industry participants capable of providing service to consumers served by an entity that chooses to close its doors rather than adjust its operations to meet the regulations. Any comprehensive rate regulation that effectively restricts rates and charges to consumers will impact the regulated ICS providers. The fact that some industry participants are capable of complying with the proposed rules strongly suggests that any entity failures in the industry are likely a result of inefficient operations, rather than confiscatory rate regulation. It would be inappropriate and against public policy to adjust regulations to support company inefficiencies in a competitive market.

To further explain our position on the gaps and loopholes in the FCC's Fact Sheet, we provide our comments below.

1. Capping or Restricting Pass-Through Third-Party Financial Transaction Fees

The FCC's Fact Sheet states "Third-party financial transaction fees, such as fees charged by MoneyGram or Western Union, may be passed through with no mark-up." Leaving such third-party financial transaction fees unfettered by caps or other restrictions creates the potential for ICS providers to enter into fee-sharing arrangements with these third parties, thereby complying with the pass-through cost component, but still unnecessarily increasing consumers' cost. This

⁴ Duration of contract is another variable that can directly increase an ICS provider's cost. The shorter the contract, the shorter the amortization period for the equipment investment, and therefore, the more costly it is to serve. Average length of inmate stay is also a contributing factor to cost. New inmates typically make more calls than inmates with a longer stay. Prisoners typically have longer stays than jail inmates, thereby leaving the costs to serve prisons allocable over potentially less usage.

⁵ In a joint filing, GTL, Securus and Telmate claim they "are the primary providers of . . . ICS in the United States and represented 85% of the industry revenue in 2013." Global Tel*Link Corporation's *Ex Parte* Notice, WC Docket No. 12-375, Att. 1, pg. 1 (Sept. 19, 2014). We question the accuracy of this statement. Moreover, using "revenue" to determine market share is inappropriate. Using revenue to determine market size does not mean that these ICS providers serve 85% of inmates or 85% of facilities. It merely means the rates and fees they charged in 2013 allegedly made them 85% of the revenue in the market, collectively. But, this "market share" could easily have been obtained by consistently charging higher rates than anyone else in the industry, resulting in the high consumer costs the FCC is attempting to avoid through rate regulation.

gap in the regulations allows ICS providers to outsource payment services to third parties who are not restricted to such caps, thereby allowing ICS providers to charge fees above the caps. Since these third party agreements are negotiated by the ICS providers without regulation, part of the agreement may require excessive “fee-sharing”, whereby the third party shares the transaction fee revenue with the ICS provider. The ICS provider may either require the third party to pay a portion of the transaction fee back to the phone services provider, or the third party reduces the fee they charge the ICS provider. Based on our experience, we believe this fee-sharing occurs today, and the rules discussed in the FCC’s Fact Sheet will continue to permit it.

As pointed out in our Comment, dated January 12, 2015 and filed in this FCC Docket, some providers are offering one-time payment calls at \$14.99 for up to a 15 minute duration call, and bill wireless calls at \$9.99 for up to a 10-minute call. We see no value in these calls. One-time payment calls, like a prepaid calling account, require the consumer to use a debit or credit card to pay for the call. These same consumers, who use their debit or credit card, would receive much lower costs by setting up a prepaid calling account. Just as the Alabama Public Service Commission (“PSC”) found in their July 7, 2014 Order in Docket No. 15957,⁶ these calls are designed to enable providers to bypass regulations and rate caps in order to charge higher costs for phone calls.

Even though the FCC’s Fact Sheet indicates the proposed rules will prohibit per-call charges, the failure to regulate the financial transaction fees can result in compliance with per-minute charges, and still permit high per-call charges. For example, as was vetted throughout the Alabama Public Service Commission’s proceeding in Docket No. 15957, ICS providers claim that much of the cost of the premium calling services are designated as a “transaction fee.”⁷ Securus reiterated this position in its May 19, 2015 filing in this Docket 12-375 stating, “Most significantly, Text2ConnectTM and PayNowTM rely on a third-party vendor that charges Securus on a per-occurrence basis.”⁸ Indeed, on its website, Securus positions the PayNowTM call as only \$1.80 for the call itself, and the transaction fee is \$13.19, for a total of \$14.99 per call.⁹ These calls can cost nearly five times the current permissible cost of a 15-minute interstate call of \$3.15 for prepaid or debit calls and \$3.75 for collect calls, which is inclusive of any per-connect or per-call fees, as set forth in Paragraph 64.6030 of the *Report and Order and Further Notice of Proposed Rulemaking in Rates for Interstate Inmate Calling Services*, FCC WC Docket No. 12-375 (released Sept. 26, 2013). Despite the current rate caps, several ICS providers are still charging as much as \$14.99 for interstate calls, more than \$11.00 over the current permissible rate cap for interstate calls.

ICS providers should not be allowed to continue to provide these premium call types, but such call types will be permissible if the proposed rules pass with the loophole of allowing third-party financial transaction fees as pass-through cost with no further restrictions or rate caps. Securus’s

⁶ An excerpt of the Alabama PSC’s findings on these premium call types is provided in Appendix A. The full order is available at <https://www.pscpublicaccess.alabama.gov/pscpublicaccess/ViewFile.aspx?Id=07d326f7-234d-4c31-b47b-82d4e07bc277>.

⁷ See Appendix A.

⁸ *Securus’s Reply to CenturyLink Notice of Ex Parte*, FCC WC Docket No. 12-375 (May 19, 2015), also available for the reader’s convenience in Appendix B.

⁹ Appendix C is a PDF printout of the website.

recent October 2, 2015 filing in this Docket 12-375 suggests they see the loophole as well.¹⁰ Securus has challenged CenturyLink to conduct a study on the impact of premium call types on total call volume. They even offer to pay for the study. But, if Securus believes the proposed rules will prohibit these premium call types, then a study would be unnecessary. While Securus's filing offers little substance on the issue, it does make clear the intent of at least one ICS provider to continue to offer premium call types with pass-through third-party financial transaction fees as a means of circumventing the FCC's rate caps, just as occurs today with the interstate calls. Indeed, why offer in-house transaction processing at all if the ICS provider can make more money by outsourcing the whole process? Furthermore, the exploitation of the loophole by one or a few ICS providers will put pressure on the other ICS providers to choose between survival and utilizing the same loophole. It is easy to see how the loophole will become the new norm; thereby making the FCC's rate caps a moot rule.

a. Arguments For and Against Regulating the Pass-Through Fees

We are aware of several arguments that some ICS providers may submit in an effort to retain these premium call types. We provide these arguments and counterarguments to assist the FCC in its consideration of the substantial and material evidence in the record as a whole to support any regulations to close the loophole.

i. The FCC has jurisdiction to regulate the amount of third-party financial transaction fees that are passed through to ICS consumers.

When the Alabama PSC was considering regulations over the transaction fees driving the costs of these premium call types, some ICS providers argued to the Alabama PSC that such transaction fees were outside the Alabama PSC's jurisdiction. Thus, some ICS providers may argue that the FCC does not have jurisdiction to regulate the amount of third-party financial transaction fees passed through to ICS consumers. But, there are several arguments supporting the FCC's jurisdiction.

First, the same statutory authority that gives the FCC jurisdiction over rates and fees charged directly by ICS providers also gives the FCC jurisdiction over the amounts and types of fees ICS providers can pass-through from third parties to consumers. If the FCC's jurisdiction were limited to certain forms of charges, ICS providers could outsource all of their funding transactions in order to bypass the FCC's regulatory authority, thereby rendering the FCC powerless to effectively regulate inmate calling services.

Second, these third-party financial transaction fees are similar to other third-party transactions that are regulated by authorities. As the Alabama PSC pointed out in Paragraph 6.26 of its Order:

The arrangement is no different than an inmate collect call submitted by an ICS provider's third-party billing aggregator to a wireline carrier. . . . The Commission

¹⁰ *Securus's Reply to CenturyLink Notice of Ex Parte*, FCC WC Docket No. 12-375 (Oct. 2, 2015), also available for the reader's convenience in Appendix D.

does not interject itself into the contractual arrangements between the third-party billing aggregator and the wireline carrier. Nevertheless, the Commission establishes the end user price for the collect inmate call charged to the wireline end user regardless of the circuitous billing arrangements selected by the ICS provider.

Thus, just as the FCC has jurisdiction to establish rates and fees for traditional collect calling that requires a third party to connect and complete the collect call, the FCC has jurisdiction over third-party financial transaction fees that are used to connect and complete the premium call types.

Third, public policy supports the FCC's jurisdiction. If the FCC could only regulate transaction fees performed by ICS providers, the regulatory scheme would naturally encourage ICS providers to outsource all financial transactions even when processing those transactions in-house would be more cost effective, as discussed by CenturyLink in its filing in this Docket on September 29, 2015. But this encouragement to outsource services that can be done in-house at a lower cost runs contrary to the public policy of instituting regulations that encourage efficiencies and cost reductions.¹¹

In summary, the FCC need not interject itself into third-party agreements to have jurisdiction and control over the effect those agreements may have on ICS consumers. If the FCC rules proposed for approval on October 22, 2015 fail to regulate transaction fees from third parties, then it is not unreasonable to expect new premium call types with only slight variations on the existing premium calls, such as a call rate that is \$13.30 for a loved one of an inmate in a large facility — \$13.19 for a transaction fee, \$0.11 for the first minute, with the remaining minutes free. This call with an effective charge of \$13.30 would arguably still be compliant if the FCC rules fail to regulate third-party financial transaction fees.

ii. The FCC's authority permits the exclusion of ICS providers' costs that are unnecessary for the provision of inmate calling services.

Some ICS providers may argue any regulations restricting third-party financial transaction fees costs prevents the ICS providers from recouping their investments, making the caps confiscatory and, therefore, unlawful.¹² This argument has many successful counterarguments. Since Securus has more information in the record about its premium call program than the other providers who offer these services, we use their program to illustrate the factors determining whether the FCC has the authority to restrict fees that could potentially result in ICS providers' loss in investments unnecessary to provide service.

As Securus pointed out on Page 3 of its filing dated May 19, 2015: "Securus made the decision to develop these services and expend \$40 Million on them." As a threshold matter, as with any voluntary business decision in a regulated industry, Securus bears the risk of loss because

¹¹ See *Bluefield Co. v. Pub. Serv. Comm.*, 262 U.S. 679, 692-93 (1923).

¹² While this further comment focuses on premium call programs, the legal arguments apply to all of an entity's costs that are unnecessary to the provision of safe and secure inmate calling services.

Securus either knew or should have known of the regulatory risk associated with discretionary investments in this FCC regulated industry.¹³

Moreover, Securus merely stating that they have invested \$40 million in a program is insufficient to satisfy the proof required to justify the costs for recovery through rates. Since the dawn of rate regulation, cost-based rates have included only reasonable and prudent costs necessary for the provision of service.¹⁴ This legal principal applies regardless of whether the rates are set through rate-of-return regulation or a rate-cap regulation, since both types of regulation require just and reasonable rates. To allow unreasonable or imprudent costs, or costs that are otherwise unnecessary for service, makes consumers pay for an ICS providers' uneconomical or inefficient management choices. Such an approach leaves ICS providers unaccountable for their investment decisions and only encourages unnecessary spending, or "gold-plated" services – a hazard we pointed out in our initial comment dated January 12, 2015 and filed in this Docket.

As the analysis of the relevant law and the facts in the record of this Docket shows below, there are numerous insurmountable hurdles to justifying these premium call types with third-party financial transaction fees as reasonable and prudent costs necessary to provide inmate calling service.

First, Securus has not provided support itemizing what costs contributed to the \$40 million they purportedly invested in premium call types. Their claim of such a high-cost investment begs the common-sense question: If they are using a third party to process transactions at costs as high as \$13.19 per call / transaction, what part of the call processing could be left to require a \$40 million investment? Securus's position on these calls also raises an interesting point. Securus claims it receives only \$1.80 in revenue per call, which is less than the current interstate rate caps. And, as the Alabama PSC found, Securus pays facilities \$1.60 per PayNowTM, leaving only \$0.20 in net calling revenue for Securus.¹⁵ If they are not engaged in any fee-sharing arrangement with the third parties processing these calls, then that \$0.20 net revenue per call must be sufficient to cover not only their operating costs for the ICS platform used to process

¹³ This principle is consistent with the FCC's statements in the *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, No. FCC 13-113, 28 FCC Rcd. 14107, ¶ 106, n. 382 (released Sept. 26, 2013) (citing *Video MDU Order*, 22 FCC Rcd at 20263, para. 58 (finding no improper interference with investment-backed expectations because, *inter alia*, "exclusivity clauses in MDU contracts have been under active scrutiny for over a decade"; "the Commission has prohibited the enforcement of such clauses in similar contexts"; and "States have also taken action to prohibit such clauses"); *Connolly v. Pension Ben. Guaranty Corp.*, 475 U.S. 211, 226-27 (1986) (declining to find interference with investment-backed expectations where subjects of regulation long had been "objects of legislative concern," where "it was clear" that agency discretion to regulate, if exercised, would result in liability; and where affected entities had "more than sufficient notice" of possibility of regulation)).

¹⁴ *Bluefield Co.*, 262 U.S. at 692-93 (holding utilities have no constitutional right to profits and rates are just and reasonable if adequate "under efficient and economical management"); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 301-02 (1989) ("[U]tility regulation does not 'take' property simply because it disallows recovery of capital investments that are not 'used and useful in service to the public.'" (citations omitted)).

¹⁵ *Generic Proceeding Considering the Promulgation of Telephone Rules Governing Inmate Phone Service*, Docket No. 15957, Further Order Adopting Revised Inmate Phone Service Rules, at 19, ¶4.11 (July 7, 2014), available at <https://www.pscpublicaccess.alabama.gov/pscpublicaccess/ViewFile.aspx?Id=07d326f7-234d-4c31-b47b-82d4e07bc277>.

both standard calls and premium calls alike, but also the \$40 million investment in the premium call program. It should not escape notice that this position could significantly undermine any position Securus may take that the proposed rates in the FCC's Fact Sheet are too low. For, even if one assumed all the calls were 2 minutes, the \$0.20 net revenue call would be \$0.10 per minute, which is less than any of the proposed rate caps in the FCC's Fact Sheet.

Second, even if Securus did provide evidence of costs of the \$40 million investment, Securus has still failed to prove that such costs are "reasonable and prudent." ICS providers must not only support that the costs exist, but they must also prove they are reasonable and prudent, and that they are necessary to provide the provision of inmate calling services. By the very fact that these premium calls are "optional", and only an alternative to other call types and / or funding methods allowed, they are not necessary. Therefore, the costs of these calls do not meet the requirements for inclusion in cost-based rates.

Third, Securus may attempt to argue that these premium call types are necessary. In referencing Text2Connect™ and PayNow™, Securus claimed on Page 2 of its filing dated October 2, 2015, "They save lives and prevent crimes." This statement is incredulous and without support. Securus has failed to distinguish how the premium call types have saved lives and / or prevented any crimes. Moreover, Securus would need to prove that the standard call types would have failed to "save lives and prevent crimes" in a circumstance when the premium call type has made such an achievement.

At ICSolutions, we can process payments in-house, and the funds are available for immediate calling upon confirmation of the payment by credit or debit card. Thus, the FCC should not be convinced that Securus's premium call types would have any advantage at inmate safety over our calls that are funded through in-house transactions. Our Prepaid Collect and Inmate Debit services provide multiple ways to pay for inmate calling, simplified account management, and connectivity to more kinds of telephones – such as cell phones, business lines and VoIP phones – that cannot be reached with traditional inmate calling. On average across the country, when we keep calling rates the same and provide our ENFORCER® calling system and prepaid calling options, our ***averages increase in both call volumes and call revenue***. Where we implement lower calling rates, we often see call volumes increase by as much as 150%, and revenues increase by about 30%. Below are some examples:

- ICS was awarded the phone services at Hunt, TX, taking over for the previous provider in 2013. The following is based upon the information provided in the RFP under the previous provider, and a comparison of 3 months in 2015 under ICS:
 - Average Monthly Calling Rates based upon usage decreased by 31.1%
 - Monthly Minutes of Calling increased by 225.4%
 - Monthly Gross Calling Revenues increased by 124.2%
 - Average Number of Monthly Calls increased by 409%

- ICS was awarded the phone services at Macomb, MI, taking over for the previous provider in 2012. The following is based upon the information provided in the RFP under the previous provider, and a comparison of 3 months in 2015 under ICS:
 - Average Monthly Calling Rates based upon usage decreased by 34.3%
 - Monthly Minutes of Calling increased by 196.1%
 - Monthly Gross Calling Revenues increased by 94.6%
 - Average Number of Monthly Calls increased by 171%
- ICS was awarded the phone services at Placer, CA, taking over for the previous provider in 2013. The following is based upon the information provided in the RFP under the previous provider, and a comparison of 3 months in 2015 under ICS:
 - Average Monthly Calling Rates based upon usage decreased by 16.8%
 - Monthly Minutes of Calling increased by 51.1%
 - Monthly Gross Calling Revenues increased by 25.7%
 - Average Number of Monthly Calls increased by 142%
- ICS was awarded the phone services at Southwest Virginia Regional Jail Association, VA, taking over for the previous provider in 2013. The following is based upon the information provided in the RFP under the previous provider, and a comparison of 3 months in 2015 under ICS:
 - Average Monthly Calling Rates based upon usage decreased by 25.1%
 - Monthly Minutes of Calling increased by 90.1%
 - Monthly Gross Calling Revenues increased by 42.9%
 - Average Number of Monthly Calls increased by 96%

The incumbents in each of these facilities regularly offered premium calls. ICSolutions does not offer these call types because we find the rates and fees are too high. It is possible that the incumbent data provided in the RFPs did not include the call volumes associated with the premium call types, which would mean that these call volumes are not necessarily an increase in calling volume, but rather a shift of the method for calling. Even if the volume of calls were the same, that means that the removal of premium call types does not diminish the availability of inmate calling services.

Fourth, even if Securus could overcome the hurdle that these calls are necessary in addition to standard call types using in-house funding, they must still justify why their costs are so much higher than other ICS providers who offer the same service for less. According to Paragraph 6.37 of the Alabama PSC Order (Appendix A), NCIC offers text-connect calls at \$5.99, which includes the funding fee and the call usage.

b. Recommendation to Regulate Third-Party Financial Transaction Fees

Premium call types with “optional” funding methods are unnecessary, and the regulated rate caps must address their costs accordingly. To close this loophole and ensure just, reasonable, and fair rates, third party payment service providers must be required to comply by the same rules and caps as inmate phone services providers. Alternatively, the FCC may consider imposing

restrictions preventing fee-sharing arrangements that increase consumers' costs. Under either approach, the FCC should define who is a "third party" to ensure that they are independent entities from the ICS providers, both in form (e.g., legally independent) and in substance (e.g., financially independent).

2. Requiring Notice Standards for Fees and Payment Options

Further, we believe consumers accept these higher cost options because they are not adequately informed of all the available calling options and related costs. The absence of regulations for notice standards allows ICS providers to design communications to keep consumers in the dark or otherwise uneducated about all of their available options and what they entail (e.g., cost, timing of availability for calling). One result is ill-informed consumers are steered toward the higher cost options.

Securus discussed this issue on Page 2 of its recent October 2, 2015 filing in this Docket 12-375 when Securus provided the announcement that all called parties hear before setting up an account, which are reproduced as follows:

If you would like to continue this call of up to <call duration of PayNow> by accepting a charge to your credit or debit card of \$14.99, please press 1

If you would like to continue this call of up to <call duration of Text2Connect> by accepting a charge to your mobile telephone bill of \$9.99, please press 2

If you would like to set up or add funds to a prepaid AdvanceConnect Account in order to pay for future calls, please press 3

Notably, the most expensive funding type is available in the first prompt, and the announcement for the lowest cost funding method, the AdvanceConnect method, does not provide the costs. The AdvanceConnect prompt states very vaguely that funds can be used for "future calls", and fails to mention when in the future those funds would be available. As previously noted, ICSolutions' process enables consumers to use funds for calling immediately. When considering that Securus's announcement is the initial information that consumers receive regarding ICS options, and some consumers may have just learned their loved one was incarcerated, it is reasonable to see how consumers can be misled, and make a decision before reaching the third prompt or consumers may be confused by the third prompt and decide they cannot wait until some undefined "future" time to talk with the inmate.

The FCC Fact Sheet does not address notice standards, and we believe rules for notice of calling options and funding methods are necessary to protect consumers. The initial calls from inmates are typically unexpected by their loved ones and, oftentimes, put called parties instantly in a stressful and emotional state of mind. Further, they require consumers to make decisions "on the spot" using information that is typically presented to them sequentially and in audible form, without visual reinforcement. The notice of calling options and payment methods, including the

content and the order in which those options are presented by automated operator systems, can deeply impact the consumers' understanding of their options.

We submit that the FCC should impose notice standards to protect consumers, requiring transparent choices unfettered by marketing strategies designed to steer consumers toward higher-cost options.

The notice standards should make it easy for consumers to know what their options are both in cost and in timing of when funds will be available. The standards should require basic, straightforward notice of all fees and payment options to connect with loved ones, along with a mandatory order of the initial announcement for standard calls and funding types before the offering of any optional funding types. Additionally, they should provide the information where all information is available visibly, such as a website.

These requirements should not preclude ICS providers from marketing certain payment options over others, but such marketing should occur separately from the communication of all fees and payment methods, and after the communication of the costs for standard call types and any in-house funding methods. Payment options and related fees should be basic and clear for consumers, regardless of which vendor provides the ICS. In addition, the FCC rule should also address how to provide notice that consumers can use funds for multiple calls.

3. Regulating Minimum and Maximum Funding Amounts

Another loophole is that the FCC Fact Sheet does not address limitations on the funding amounts for each transaction. ICS providers can simply lower the maximum funding amount they will process per transaction, thereby requiring consumers to fund their account more frequently so that they can charge more ancillary payment fees. Allowing a low maximum funding limit will permit ICS providers to avoid the form of a per-call fee, but still accomplish the substantive effect of per-call fees.

Additionally, some providers require consumers to deposit at least \$25.00 to fund a prepaid calling account. Allowing a high minimum funding requirement can preclude consumers from receiving calls from their loved ones. For someone that has just been arrested and only wants to make a single call to arrange bail, requiring a minimum \$25 is unjust and unreasonable.

To address this loophole, we strongly recommend that the FCC approve rules that prohibit any maximum funding amounts per transaction less than \$50.00. A maximum funding amount is warranted since ICS providers are charged a percentage of the transaction amount by credit and debit card companies. Thus, an unlimited funding amount could force the ICS provider to incur unnecessary expenses. Moreover, our experience prior to the rate caps on in-state calls, the average funded amount is approximately \$26.97, which includes funding fees. Since this is the average of both the high and the low funded amounts, we recommend the FCC's regulations double this amount. Likewise, we recommend that the FCC prohibit minimum deposit amounts. In addition, similar to the caps, these rules should apply to all transactions, whether they are processed directly by ICS providers or third parties.